STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORYANO OLLE DESHAN COOKS,

Defendant-Appellant.

UNPUBLISHED
April 23, 2002

No. 228024
Kent Circuit Court
LC No. 99-009070-FC

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of one count of armed robbery, in violation of MCL 750.529. The trial court sentenced defendant to thirty to ninety years' imprisonment. Defendant now appeals by right. We affirm.

Defendant first asserts that the trial court erred in allowing a witness to identify defendant during trial, even though the circumstances surrounding the witness' initial, pretrial identification were unduly suggestive. We disagree.

A trial court's ruling on the admissibility of identification evidence will not be overruled unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin J.), 318 (Boyle, J.); 505 NW2d 528 (1993). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*. at 303. An identification procedure violates a defendant's right to due process "when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "[A]n improper suggestion often arises when 'the witness when called by the police or prosecution either is told or believes that the police have apprehended the right person.' Moreover, when 'the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person.'" *Id*., quoting *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973).

The witness, Leonard Welch, testified that after he arrived in the courthouse for the preliminary examination, someone mentioned that it would be held in the courtroom near the victim witness unit. However, Welch also testified that no one told him whether he should or should not go into the courtroom at any particular time. After leaving the witness room to get a drink of water, he entered the courtroom and sat down. Just as he sat down, he was told that he would need to leave; however, he almost immediately recognized that defendant was sitting in

the courtroom, while dressed in "jail greens," with a guard present. Welch testified that he had been told a suspect was in custody, but he was not told that the suspect was in the courtroom.

Generally, preliminary examination confrontations are not presumed to be unduly suggestive. *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984). We do not believe Welch's identification was "so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *Gray, supra* at 111. The evidence does not establish a definite and firm basis for believing the trial court made a mistake by allowing Welch's identification testimony. *Kurylczyk, supra* at 303 (Griffin J.), 318 (Boyle, J.). However, even if there were a tainted identification, we find that Welch had an independent basis to identify defendant based on the factors expressed in *Gray, supra* at 114-116. On the night of the robbery, Welch had an opportunity to get a very good look at defendant on two separate occasions, when defendant was in Welch's yard and when defendant was in the getaway car. Welch, a non-victim, was able to observe defendant under relatively calm and safe circumstances, at least from his apparent perspective. At the time of the crime, Welch gave an accurate description of defendant, and when he was in a position to identify defendant, he did so almost immediately.

Defendant next asserts that when the prosecutor inappropriately commented several times in her closing argument about the non-degraded nature of the blood found near the crime scene, and improperly expressed her opinion regarding defendant's guilt, he was deprived of a fair trial. Again, we disagree.

Because defendant failed to object to these occurrences at trial, defendant must show: (1) that an error occurred; (2) that the error was plain (clear or obvious), and; (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Generally, a claim of prosecutorial misconduct is reviewed de novo, but the trial court's factual findings are reviewed for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

"A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant argues that "you cannot date blood but the prosecutor incorrectly argued to the jury that the blood was not degraded." However, the evidence technician who gathered blood near the scene of the robbery testified that although blood cannot be dated, the blood found on the hood of the car was clean and still bright red. The police forensic scientist who analyzed the blood also testified that the testing he did on the samples would have indicated if either sample had degraded, and there was no such indication. The prosecutor did not try to "date" the blood, but merely tried to show that it had been present for a relatively short period of time.

Because evidence was offered regarding the degradation of the blood, the prosecutor was free to make reasonable statements relating to its condition. *Id.* Therefore, defendant has failed

to show that plain error occurred. As a result, this issue is forfeited on appeal. *Carines, supra* at 763.

Defendant also argues that the prosecutor improperly opined regarding defendant's guilt in her closing argument. However, the prosecutor was simply arguing the evidence that had been presented and drawing the inference that defendant was guilty. The prosecutor's statements, based on the evidence, did not interject "issues broader than the guilt or innocence of the accused." *Rice, supra* at 438. As a result, this issue is also forfeited on appeal.

Defendant next asserts that by telling the jury it could not return a verdict unless it was unanimous, the trial court "coerced" the jury into rendering a verdict of guilty, not guilty, or guilty of a lesser count, and did not allow it to return no verdict at all. We disagree. Because this issue was also not properly preserved, the standard in *Carines* applies to this issue as well. Claims of instructional error are reviewed de novo by this Court. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Aldrich, supra*.

Defendant fails to illustrate how the jury was denied the ability to return no verdict at all. The trial court properly instructed the jury that each juror should vote his or her conscience and not vote a certain way "just for the sake of reaching a verdict." Because the instructions were legally accurate and adequately protected the rights of defendant, defendant has failed to establish that any error occurred, plain or otherwise. Therefore, this issue is also forfeited on appeal.

Defendant finally argues that he received ineffective assistance of trial counsel based on Issues II and III. Because there was no impropriety regarding the prosecutor's comments about the blood found near the scene of the crime and defendant's guilt or in the instructions given to the jury, defense counsel's objection would have been meritless. Counsel is not under any type of obligation to bring frivolous or meritless motions, *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998), or objections, *People v Torres* (*On Remand*), 222 Mich App 411, 425; 564 NW2d 149 (1997).

We affirm.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray